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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 439

WOOTTON HOTEL CORPORATION,
Petitioner,

vs.

NORTHERN ASSURANCE CO., LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wootton Hotel Corporation, respectfully prays this Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that Court entered on May 28, 1946, affirming a judgment of the United States District Court for the Eastern District of Pennsylvania, entered on the 3d day of October, 1944.

Opinions Below

The Opinion of the District Court (R. 20a) is reported in 57 F. Supp. 112. The Opinion of the Circuit Court is not, as yet, reported in the official reports, but copy is attached to the record sent to this Court, at the end thereof.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 28, 1946. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Section 240(a) and (b) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347.

Questions Presented

1. Is a policy of insurance which is countersigned and delivered in the State of Pennsylvania, a Pennsylvania contract, to be governed by the law of Pennsylvania, where the policy provides that it shall not be valid until countersigned?

2. Does an executory agreement of sale violate the sole and unconditional ownership clause in a policy of insurance where, at the time of the loss, the plaintiff had title and possession to the insured property?

3. Where, in a suit upon a windstorm policy covering a pier extending into the ocean and completely surrounded by water, the evidence presented showed the occurrence of a windstorm of 55-mile per hour velocity; that during and because of such storm, a portion of the pier was destroyed and carried away, and the remaining portion weakened, is not the evidence sufficient to require a finding that the damage was caused by the windstorm?

4. Under such evidence, must not the Court find that the wind was the proximate cause of the damage?

5. If the evidence establishes that a strong wind of 55-mile per hour velocity preceded the damage to a pier insured under a windstorm policy, is this evidence not sufficient to warrant a recovery for the plaintiff under such policy even though there is additional testimony that the windstorm created rough seas and waves of great force and pressure to which the final destruction of the pier can be attributed?

6. Where a windstorm, cyclone and tornado policy contains an exclusion relieving the insurer from liability for damage caused by high water whether wind driven or not, will the policy be construed to relieve the insurer from liability for damage caused by wind driven water or rough seas?

Statement

On August 2, 1941, the plaintiff held title to and had possession of a pier situated 15th and Ocean Avenue, Brigantine Beach, Atlantic County, New Jersey.

The pier fronted on the public boardwalk and extended at right angles to the boardwalk out into the ocean for a distance of more than 350 feet. The pier was approximately 100 feet wide at the boardwalk or land end, and narrowed down to approximately 40 feet at the ocean end. A frame building was erected on the pier at the land end—approximately 100 feet wide by 60 feet in length. The rest of the pier, except for two small superstructures, was an open deck enclosed by railing. The pier was built upon wooden pilings.

On or about August 2, 1941, the defendant, an insurance company of London, England, issued its standard windstorm policy in the sum of $13,000.00, which covered, *inter*

alia, the said pier for the term of one year from August 2, 1941, to August 2, 1942, in the amount of $10,000.00, insuring plaintiff against all direct loss and damage by windstorm, cyclone and tornado except as therein provided.

The policy was issued by the defendant in the State of Pennsylvania and delivered to the plaintiff in the City of Philadelphia, State of Pennsylvania, having been ordered, written and countersigned at the Philadelphia branch office of the defendant located at 424 Walnut Street, Philadelphia, Pennsylvania.

On or about March 2d and March 3, 1942, while the policy was in full force, Brigantine Beach, New Jersey, was subjected to a severe storm during which a wind of gale force reached a maximum velocity of 55 miles per hour.

The average normal hourly wind velocity in the area in which the said pier was located (Brigantine Beach, N. J.) for that time of the year (March 2d and 3d) was 16.8 miles.

During this storm a portion of the pier 30 feet in length by 60 feet in breadth was destroyed and carried away.

After the storm an examination of the said pier disclosed that, as a result of the storm, the portion of the said pier remaining had been weakened and damaged.

By agreement dated the 2d day of February, 1942, plaintiff agreed to sell the pier (and other property) but under the terms of the agreement possession of the property and title to the property remained in the plaintiff until settlement, which took place after the date of the loss, on or about March 10, 1942.

Claim was made on the insurance company for $7717.00 made up as follows: $3125.00 to replace the portion of the pier destroyel and carried away and $4592.00 covering the cost of repairing the damage to the part of the pier that remained standing.

Upon refusal to pay the claim, suit was instituted and the case came to trial on April 10, 1944, before the Hon. Harry E. Kalodner. The defenses set forth by the insurance company were:

1. That the loss or damage suffered by the plaintiff was not caused by the wind but by the action of the sea and water.

2. That the plaintiff had violated the sole and unconditional ownership clause of the policy.

3. That the plaintiff had under-insured the pier.

After hearing and submission of requested findings, the Court filed its opinion sur pleadings and proof. The Court's opinion made no findings on the two latter defenses but in finding for the defendant the Court relied solely upon its finding that the damage to the pier was caused by *high water* driven by wind, which hazard was held to be expressly excepted by the terms of the policy.

Thereafter, the plaintiff filed its motions for a new trial and to amend the findings (App. 25-26a). After argument on these motions, the lower Court denied the motion for a new trial for the reasons set forth in its prior opinion.

Plaintiff argued, *inter alia*, before the Circuit Court that no evidence had been offered by the defendant as to the existence of "high water" within the meaning of the policy and, hence, that there was no evidence to bring the loss within this exclusion of the policy. The Circuit Court, however, affirmed the finding for the defendant upon the ground that the plaintiff was not entitled to recover because it had violated the "sole and unconditional ownership" clause of the policy.

Specification of Errors

The Circuit Court of Appeals erred:

1. In holding that the policy of insurance sued upon was a New Jersey contract.

2. In holding that plaintiff had violated the sole and unconditional ownership clause contained in the policy of insurance sued upon.

3. In failing to apply the Pennsylvania Law of Proximate Cause to the instant case.

4. In refusing to hold that the finding of the Lower Court, to the effect that "high water" within the meaning of the policy exclusion caused the loss, was erroneous.

Reasons for Granting the Writ

The first question presented is whether the contract of insurance is to be construed under the Laws of Pennsylvania or New Jersey. Admittedly, the policy in suit was written, executed and delivered in the State of Pennsylvania.

Both the District Court and the Circuit Court of Appeals decided that the policy was a New Jersey contract.

It is respectfully submitted that such finding is contrary to the law.

In the case of *New York Life Insurance Co.* v. *Levine*, 138 F. (2d) 286, the Court stated the law:

> "Before we determine what law the district court should have applied to the construction of these policies we must ascertain the conflict of laws rule which would be followed by the Courts of Pennsylvania, the state in which the District Court sits. Under the Pennsylvania conflict of laws rule the interpretation of a contract is determined by the law of the place of

> contracting. In Pennsylvania it is held that the place of contracting in the case of an insurance contract is the place where the policy was delivered."

The great weight of authority holds that the construction of an insurance contract is governed by the law of the state where the contract was made.

Ruhlin v. *New York Life Insurance Co.*, 106 F. (2d) 921, certiorari denied. 60 Sup. Ct. 469; 309 U. S. 655, 84 L. Ed. 1005; rehearing denied 60 Sup. Ct. 588; 309 U. S. 695, 84 L. Ed. 1035.

Harry L. Sheinman & Sons v. *Scranton Life Insurance Co.*, 125 F. (2d) 442;

Shane v. *Commercial Casualty Co.*, 48 F. Supp. 151.

In *Ruhlin* v. *New York Life Insurance Co., supra,* the Court held that:

> "It is a general rule that the construction of an insurance contract is governed by the law of the state where the contract is made • • • The contract is made where the last act legally necessary to bring it into force takes place."

In the case at bar, the last act necessary to bring the policy into force was the countersigning of the policy. That act, admittedly, took place in Pennsylvania. Under the law and the facts, the contract was a Pennsylvania contract.

Under Pennsylvania law and the weight of authority, the plaintiff is entitled to recover if the hazard insured against is the dominant, efficient cause which sets other causes in operation.

Trexler v. *Allemania Insurance Co.*, 289 Pa. 13; 136 Atl. 856;

Phenix Insurance Co. v. *Charleston Bridge Co.* (C. C. A. 4th) 65 F. 628;

Queen Insurance Co. v. *Hudnut Co.*, 8 Ind. App. 122, 35 N. E. 397;

Miller v. *Farmers Mutual Life Insurance Assn.*, 198 N. C. 572, 152 S. E. 684;

Jordan v. *Iowa Mut. Tornado Insurance Co.*, 151 Ia. 73, 130 N. W. 177;

Fidelity Phenix Ins. Co. v. *Anderson*, 81 Ind. App. 124; 130 N. E. 419.

In the instant case the hazard insured against was damage caused by windstorm. Again, the facts are clear that the wind velocity was approximately three-and-a-half times the average normal wind velocity; that in this storm a portion of the insured property was destroyed. The insurance company raised the defense that the loss or damage was caused by "high water", an exclusion under the policy. Both the District Court and the Circuit Court failed to rule on the question as to whether the wind was the dominant or efficient cause of the loss, and the true meaning of "high water" as a policy exclusion.

It is respectfully submitted that the failure to decide these questions constitutes error.

It is submitted that the Circuit Court erred in deciding that the plaintiff had violated the "sole and unconditional" ownership clause in the policy, the plaintiff having, prior to the loss, entered into an executory contract of sale for, *inter alia*, the property insured; but, admittedly, both title to and possession of the insured property remained in the plaintiff, and at the time of the loss neither title to the property, nor possession, nor the right to possession, passed to the purchasers until March 10, 1942. Although the District Court failed to make any finding in connection with this defense, the Circuit Court based its decision solely upon this issue. Such holding, it is respectfully submitted, is contrary to the law.

In *Glessner* v. *Insurance Co.*, 331 Pa. 439, the Court said:

> "Mere executory contracts unaccompanied by any transfer of possession do not constitute such a change as would render the policy void. Hill *v.* Cumberland Valley Mutual Protection Co., 59 Pa. 474; Kronk *v.* Birmingham Insurance Co., 91 Pa. 300; Walter v. Sun Fire Office, 165 Pa. 381, 30 A. 945; Dunsmore *v.* Franklin Fire Insurance Co., 299 Pa. 86; 149 A. 163."

It is further submitted that an insurance carrier, having accepted a premium for insurance against a given hazard, should not be permitted to retain the funds due upon the happening of the contingency insured against simply because its assured had contracted to sell the insured property. Whether the assured or its vendee suffers the loss, whether the assured recovers for the benefit of its vendee, or any questions between the assured and its vendee should have no effect upon the liability of the insurer. Were the rule otherwise, the insurer would be unjustly enriched and would escape liability for loss for which it had accepted a premium. If the reason for barring recovery upon a true breach of the sole and unconditional ownership clause rests in the fact that a new assured has taken possession of the insured property and the insurer should not be forced to accept a new assured whose relationship to the property may be more hazardous than the original assured, that reason has no application in the instant case since no new assured had entered into or taken possession of the insured property.

It is respectfully submitted that the Pennsylvania authorities, as well as the decision relied upon by the Circuit Court (*Levin* v. *State Assurance Co.*, 105 N. J. L. 422—Ct. E. & A.) recognize that change of possession must be shown in order to bar recovery on the ground of breach of the sole and unconditional ownership clause. In the instant case, however, the Circuit Court barred recovery even though no

change of possession was made nor, in fact, was the vendee entitled to possession at the time of the loss.

For the foregoing reasons, it is respectfully urged that the Writ be granted.

Prayer

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this Cause, to the end that this Cause may be reviewed and determined by this Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 439

WOOTTON HOTEL CORPORATION,
Petitioner,

vs.

NORTHERN ASSURANCE CO., LTD.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The Opinion of the District Court is found on page 20a of the Record. The Opinion of the Court of Appeals of the Third Circuit is included in the Record sent to this Court, at the end thereof.

Statement of the Case

A statement of the matter involved has been fully presented in our petition and the Court is respectfully referred to pages three, four and five herein.

Jurisdiction

The jurisdiction as to review is stated in the foregoing petition.

Argument

The District Court concluded that the law of New Jersey and not of Pennsylvania was applicable and then applied a decision rendered under New Jersey law wherein "wind driven water" was an excepted risk. As will be hereinafter demonstrated, "wind driven water" was not an exclusion under the policy in suit.

The Circuit Court also concluded that the law of New Jersey was applicable, but did not pass upon the question as to whether or not the loss came within the policy exclusion of wind driven *high water,* and based its decision for the defendant solely on the ground that the plaintiff has violated the "sole and unconditional" ownership clause of the policy; which, although it had been set up as a defense, was not made the subject of a finding by the District Court.

The Contract of Insurance Was a Pennsylvania Contract and Not a New Jersey Contract

The uncontradicted evidence is that the policy in suit was ordered, written, executed and delivered in Pennsylvania, and under such circumstances the policy must be considered a Pennsylvania contract and construed under the law of Pennsylvania.

In *Harry L. Sheinman & Sons* v. *Scranton Life Ins. Co.,* 125 F. (2d) 442, it was held that under Pennsylvania law an insurance contract is deemed to have been made at the place of delivery. The great weight of authority holds that the construction of an insurance contract is governed by the law of the State where the contract was made.

Sheinman & Sons v. *Scranton Life Ins. Co. supra.*

Ruhlin v. *New York Life Ins. Co.,* 106 F. (2d) 921, certiorari denied, 60 S. Ct. 469; 309 U. S. 655, 84 L. Ed. 1005, rehearing denied, 60 S. Ct. 588; 309 U. S. 695, 84 L. Ed. 1035.

Appleman on Insurance, Vol. 12, p. 7088, states the law thus:

> "If it is required that a policy be countersigned before going into effect, the place of counter-signature is generally considered the place of the last effective act, and determines the controlling law. Thus, where it is required that the policy be countersigned and delivered by a local agent of the company before taking effect, *the place in which such acts are performed* governs the construction of the contract." (Italics ours.)

There is much authority to support this rule.

In an ordinary policy like the one before us, dependent for validity upon countersignature and delivery by a local agent, "the place of the contract is fixed by the place where the agent countersigns and delivers the policy"; 32 C. J. 980 and cases cited; *Joyce on Insurance,* Sec. 229.

Kustoff v. *Stuyvesant Ins. Co.,* 22 S. W. 2, 356.

In the case of *Todd* v. *State Ins. Co.,* 3 W. N. C. (Pa.) 330, the policy contained the language "this policy shall not be valid unless countersigned by the duly authorized agent of the company at New York City." The insurance was effected upon property in New Jersey, the premium being paid to the agent in New York City, who countersigned and delivered the policy, in New York.

The Court held that the contract was governed by the law of the State wherein the policy was countersigned.

See to same effect:

Pomeroy v. *Manhattan I. Co.,* 40 Ill. Rep. 398.

In *Joyce on Insurance,* Vol. 1, p. 610, it is stated:

> "Where the policy is not to be valid till countersigned by the agent, it will be construed according to the law *of the place where such act is performed* and the policy *delivered,* although the policy is dated in

another state and signed by the president and secretary there."

In *Weiditschka* v. *Supreme Tent, etc.*, 188 Iowa 183, 170 N. W. 300 (Iowa), the Court said:

> "Contrary to the appellant's contention, the contract of insurance so consummated is governed by the laws of Iowa, rather than those of Michigan. The recent cases are quite in accord in holding that the place where the final act occurs which makes the insurance binding is the place of the contract and that the validity and construction of the contract are therefore to be determined by the laws of that place." (Citing cases.)

In *Curtiss* v. *Aetna Life Ins. Co.*, 90 Cal. Rep. 245, 27 Pac. 211, it was held that a life policy issued by an insurance company of another state, which expressly provided that it should not be operative until countersigned by the general agent of the insurance company at San Francisco and which was so countersigned, was a written contract of the State of California within the meaning of the statute of limitations.

In *Miller* v. *Maryland Casualty Co.*, 193 Fed. 343 (C.C.A. 3rd Cir.) Judge Buffington flatly ruled that:

> "The policy in question being countersigned and delivered in Pennsylvania, was a Pennsylvania contract."

See also:

Northwestern Mut. Ins. Co. v. *Elliott*, 5 Fed. Rep. 225, 228.

In *Ruhlin* v. *New York Life Ins. Co.*, 106 F. (2d) 921 (C. C.A. 3rd), the Court held that:

> "It is a general rule that the construction of an insurance contract is governed by the law of the State

> where the contract is made. * * * The contract is made where the last act legally necessary to bring it into force takes place."

The last act necessary in the case at bar was the countersigning and delivery of the policy both of which admittedly took place in the city of Philadelphia, Pennsylvania.

The attention of the Court is respectfully directed to Couch Encyclopaedia of Insurance Law (1929), Sec. 198:

> "If a policy of insurance is not to be valid until countersigned by the insurer's agent, it will be construed according to the law of the *place* where such act *is performed* and the policy is delivered although the policy is dated in another state. * * *"

The evidence in this case is *clear* and *undisputed* that the policy was written at 424 Walnut Street, in Philadelphia, Pennsylvania; that the New Jersey agent signed it at 424 Walnut Street, Philadelphia, Pennsylvania; that the policy was delivered "to the man who ordered it" at 406 Sansom Street, Philadelphia, Pennsylvania. Thus, the *place* of countersigning and delivery was in Pennsylvania.

In *Huth* v. *New York Ins. Co.*, 21 N. Y. Super. Ct. 538, where the policy provided that it should be countersigned by the insurer's agent in a Chinese port, it was contended that the place of contract was such port. The Court, however, said that as the company was a New York corporation, the vessel an American vessel, and the contract purported to be executed and countersigned in New York, the fact that it was declared not to be binding until countersigned by the agent at Canton was not indicative of the place of contract, as such countersigning should be regarded as a mere authentication of the issue and delivery, and the contract must be looked upon as a New York contract.

It is submitted that the true rule of law is that the place of countersigning by the insurer's agent will be held the

locus contractus irrespective of where the agent resides, and that the residence of the agent and the place where the policy was countersigned need not necessarily be one and the same, notwithstanding that under the exact language of the *Hardiman* case, relied upon by the Court below, it is inadvertently made to appear that the place where the agent resides will be held to govern.

See *Hardiman* v. *Ins. Co.*, 212 Pa. 383, 61 Atl. 990.

The reason New Jersey law was applied in the *Hardiman* case is that the policy in that case was in fact written, executed and countersigned in New Jersey. *But that is not this case.* In *this* case the policy was written, executed, countersigned and delivered in *Pennsylvania.*

The proper rule to be applied is the rule that for the purpose of determining by what law its construction and effect should be governed, the place of the delivery of the contract (where the final act necessary to the completion of the contract and which makes it binding on both parties, took place) controls.

1 Couch Ins., Sec. 196;

See also: *Appleman on Insurance,* Vol. 12, p. 7088.

This rule is further substantiated by the Restatement of Law, Conflict of Laws, Sec. 318, which says:

> "When an insurance policy becomes effective upon delivery and is sent by the company to its agent and by him delivered to the assured, the place of contracting is where it is thus delivered to the assured."

In accord with the Restatement section quoted are the following Pennsylvania cases.

White v. *Empire State Degree of Honor*, 47 Pa. Super. Ct. 52;

Todd & Co. v. *State Ins. Co.*, 3 W. N. C. 330.

In the case at bar, the contract was *completed* in the Commonwealth of Pennsylvania, regardless of the personal residence of MacConnell. If he was an authorized agent in New Jersey but resided in California, and countersigned the policy in Pennsylvania, surely the policy would not thereby become a California contract. Yet if the *exact* language of the *Hardiman* case (*supra*) was regarded that would be its effect.

We submit that the *Hardiman* case does not control here but that in the light of all of the authorities heretofore cited the contract in suit was a Pennsylvania contract.

B(1): *Under Pennsylvania Law and the Weight of Authority the plaintiff is entitled to recover if the hazard insured against is the dominant, efficient cause which set other causes in operation.*

Applying the Pennsylvania Law, the rule in *Trexler* v. *Allemania Ins. Co.*, 289 Pa. 13, 136 Atl. 856, would govern the case at bar. There, the Court said:

> "Under the terms of the policy defendant was liable only if the windstorm was the direct cause of the damages. The word 'direct' as there used, means 'immediate' or 'approximate,' as distinguished from 'remote' or 'incidental.' See Western Assur. Co. *v.* Hann, 78 So. (Ala.) 232. In this connection the trial judge properly charged the jury, in effect, that to recover, plaintiff must prove by the weight of the evidence that the windstorm was the dominant and efficient cause of the fall of the sheds, but declined to say that if snow pressure contributed in any degree to such fall there could be no recovery. In adjusting the liability of an insurance company, if the risk insured against was the proximate cause of the loss there can be a recovery, although a peril outside of the policy may have remotely or incidentally contributed thereto; Insurance Co. *v.* Transp. Co., 79 U. S. 194. As stated in Hartford Steam Boiler L. & Ins. Co. *v.* Pabst Brew-

ing Co. (Wis.), 201 Fed. 617: 'In determining the cause of a loss for the purpose of fixing insurance liability, when concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss.' While the peril insured against must be the approximate cause of the loss it need not be the sole cause. For example, in the instant case, if the sheds were directly destroyed by the windstorm, that snow on the roofs may have remotely contributed to the result, would not defeat plaintiff's claim. In fact, under plaintiff's evidence, it is not clear that snow pressure contributed, even remotely, to the result; but conceding it did, that would not defeat plaintiff's right of action. Where a windstorm, covered by the policy, was the efficient cause of the loss, the fact that other outside causes contributed thereto will not relieve the insurer: Jordan *v.* Iowa Mutual Tornado Ins. Co., 130 N. W. |Iowa) 177, and see Richelieu and O. Nav. Co. *v.* Boston Marine Ins. Co., 26 Fed. (Mich.) 596, 604."

Many other jurisdictions have followed the principle of efficient, dominating, cause in permitting recovery on a windstorm policy:

Phenix Ins. Co. v. *Charleston Bridge Co.* (C. C. A. 4th), 65 F. 628;

Queen Ins. Co. v. *Hudnut Co.*, 8 Ind. App. 122, 35 N. E. 397;

Miller v. *Farmers Mut. L. Ins. Assn.*, 198 N. C. 572, 152 S. E. 684;

Jordan v. *Iowa Mut. Tornado Ins. Co.*, 151 Ia. 73, 130 N. W. 177;

Fidelity Phenix Ins. Co. v. *Anderson*, 81 Ind. App. 124; 130 N. E. 419.

In the *Jordan* case, cited *supra*, the Court said:

"Again it is contended that the storm was not the proximate cause of the loss or damage; that the injury

to the cattle was due directly if not solely to the conditions of the temperature. It is a question of fact to be determined from the testimony and without setting it out it is sufficient to say that the trial court was justified in finding loss would not have happened but for the windstorm, and that this windstorm was the efficient cause of the damage. That other irresponsible causes may also have contributed to the loss does not of itself relieve the defendant from responsibility."

In *Muller* v. *Globe & Rutgers Ins. Co.*, 246 Fed. 759, the Court held that that cause is proximate which sets other causes in motion, and an intervening act is not a proximate cause unless it is efficient to break the causal connection. The Court said:

> "That cause is proximate which sets the other causes in motion; only when causes are independent is the nearest in time looked to. Ins. Co. *v.* Boon, 95 N. S. 117. * * * If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proximate cause of injury, unless it is efficient to breka the causal connection. * * *"

Proximate cause of injury or loss is a question of fact for the jury or court to decide unless there is but one inference possible under the settled facts.

In *Appelman on Insurance*, Vol. 5, p. 3142, it is stated:

> "Wind must be an efficient cause of loss in order to recover on a windstorm policy. And where the term 'direct' is used, referring to the cause of loss, it means proximate or immediate. The insured may recover if the cause designated in a windstorm policy is the efficient cause of the loss, though there may have been other contributory causes, and where a policy insured against damage by wind, but excluded damage by water, it has been held proper to instruct the jury that if the dominating cause of the injury was wind, the policy covered the loss. * * *"

In *Phenix Ins. Co.* v. *Charleston Bridge Co.* (C. C. A. 4th), 65 F. 628, the court held that:

> "Where suit was brought on a policy insuring against loss or damage to a bridge by windstorm, cyclone or tornado, but excepting liability from such causes as high water, flood, or freshets, and the evidence tended to show that the bridge was broken by schooners and barges being driven against it by a cyclone, which also caused an abnormal rise in the water, but there was no evidence from which the jury could have proportioned the loss between wind and water, it was held that the court correctly instructed the jury that if the efficient cause of the damage was high water, flood, or freshet, the policy did not cover the loss, but that if the dominant efficient cause was a cyclone, tornado, or windstorm, then a recovery might be had, and that the refusal of the court to instruct the jury that if they found that any of the damage was caused by water no recovery could be had on account of such damage was proper, there being no evidence by which the jury could have discriminated between the water damage and the wind damage."

In *Queen Ins. Co.* v. *Hudnut Co.*, 8 Ind. App. 22, 35 N. E. 397, it was said:

> "Where the insurer's answer alleged that the plaintiff's loss was not occasioned by a tornado, cyclone or hurricane, but by a very high wind which forced a boat up against the damaged building, the court said: 'That the hurricane itself, coming in contact with the building, did not alone cause the damage is not material, but if it caused another body to come in contact and do the damage, the hurricane would be the direct and controlling cause."

And it was held in *Miller* v. *Farmers Mut. L. Ins. Asso.*, 198 N. C. 572 ,152 S. E. 684, that:

> "If the windstorm in question was the efficient cause of the damage and snow was contributory, the com-

bined effect would be attributed to the efficient cause, upon the principle that it was generally sufficient to authorize a recovery on the policy that the cause designated therein was the *efficient cause of the loss,* although other causes contributed thereto. In this case assured sued to recover for damage to a pavilion insured by him against cyclone, tornado or windstorm, and gave evidence that a windstorm had heaped quantities of snow on the building so as to crush the top and that due to the terrific windstorm and the snow on top of the building, it collapsed."

In *Fidelity Phenix F. Ins. Co.* v. *Anderson,* 81 Ind. App. 124, 130 N. E. 419, a windstorm was held to be the proximate cause of the death of a horse, so as:

> "To entitle the assured to a recovery under a policy insuring against loss or damage by windstorm or cyclone, where it appeared that such horse was securely shut in a barn, and that by reason of a violent windstorm the barn door was blown violently inward, either causing such a loud noise as to terrify the horse so that it surged backward, breaking its halter, and became wedged in the stall timbers, from which, as a result of its efforts to free itself, it died, or knocking the horse backward into the timbers and injuring it, so that its death resulted, the court stating that in either case the wind must be held to have been the immediate and proximate cause of the injury, *since a construction of the policy that would hold the company liable only in the event of injury from direct impact of the wind would practically nullify the policy as a protection to the insured.*"

Was the windstorm the dominant and efficient cause of the loss: If it was, the fact that a peril outside of the policy or excluded by it, contributed incidentally to the loss, will not bar recovery. In other words, was the wind the dominant, efficient cause that set any other contributing causes into operation? In the case at bar, the windstorm

stirred up the seas and as the wind velocity increased so did the pressure of the sea on the insured property.

B(2): Newark Case Distinguished

While the defendant and the learned lower Court contend that the case of *Newark Trust Co.* v. *Agricultural Ins. Co.*, 237 Fed. 788, is applicable because the insuring clauses are identical in the policy sued upon in the instant case with the policy before the Court in the *Newark* case, an examination of the policies will show that they are *dissimilar* and that the *Newark* case was decided on a specific and additional exclusion which is not present in the policy sued upon in the instant case. Furthermore, a reading of the decision will reveal that had the additional exception been absent in the policy considered in the *Newark* case, the Court there would have adopted the rule as stated in the Pennsylvania cases—*i. e.*, recovery may be had if the wind was the proximate cause of the loss. A comparison of the facts is essential.

The policy in the *Newark Trust Co.* case had two clauses of exclusion:

The *first* excluded "loss or damage occasioned directly or indirectly by . . . tidal wave . . . high water . . . overflow . . . cloudburst."

The *second* excluded "loss or damage caused by *water* or rain whether driven by wind or not."

The policy in the instant case contained *only* the exclusions found in the first clause of the *Newark Trust Co.* case.

Thus, as the Court, in the *Newark* case, itself said, the company:

> "* * * after disclaiming liability for damage caused by such specific water forces as tidal wave, high water, overflow and cloudburst, the insurance company broadly refuses to assume liability for any

> loss or damage caused generally by water, even when 'driven by wind'."

The Court found that the plaintiff's case came not within the first exclusory clause (which is the only one in our case) but within the second exempting clause.

Then the Court said:

> "We are of opinion that this clause dispenses with the consideration of the question of proximate cause as raised in this case."

And, further:

> "If the liability clause and the quoted clause of exceptions (the first clause) constitute the whole of the company's undertaking, the inquiry as to the proximate cause of the damage whether of wind or high tide (high water) might be pertinent * * * *but there is a second clause of exceptions in which are included other elements* with respect to which the company refused to make itself liable."

In the case at Bar there is no such second clause which excludes loss or damage caused by *water*.

Here, depending on the exclusions, the defendant must affirmatively show that the loss or damage was caused by wind driven "high water" and not wind driven water.

In its third defense, defendant asserted:

> "Defendant avers that the loss or damage to plaintiff's pier was caused and occasioned either directly or indirectly by tidal wave and high water which may have been driven by wind. Liability for such loss is expressly excluded by the terms of the policy."

It proved neither tidal wave nor high water.

If the excluded phenomena of nature which might in any way involve the presence of water, are listed specifically,

for purposes of clarity, it is found that the policy excludes the following hazards:

1. Tidal wave—whether wind driven or not.
2. Overflow—whether wind driven or not.
3. High water—whether wind driven or not.
4. Rain—whether wind driven or not.
5. Snow—whether wind driven or not.
6. Cloudburst.
7. Water from sprinkler equipment.
8. Water from other piping.

These are all of the exclusions to be found anywhere in the policy which in any way involve the presence of water in some form.

It is important to note that nowhere in the policy is "water" in its generic sense excluded. Thus, damage caused by water is excluded only in those cases where water is found to exist and be manifested in one of the several forms listed above. Liability for damage resulting from the effect or operation of sea water whether wind driven or not, is not expressly excepted. Since the insured property was located in the sea, an additional exception or exclusion eliminating liability if wind driven water contributed to the damage would have rendered the policy a nullity, for any windstorm necessarily would create rough seas which, in turn, would contribute in some measure to the damage.

The Court must therefore decide the question of the application of the rule of proximate cause which the Court in the *Newark Trust Co.* case felt it was not obliged to decided.

In the case at bar, the express condition of liability was damage by windstorm. This burden is satisfied upon proof that the windstorm did proximately or immediately cause

the damage, notwithstanding that some other cause or factor may have contributed to the loss.

It is sumbitted that the law of the *Trexler* case, *supra*, so fully supported by all authorities and in pure logic and reason is to be followed in the instant case.

Erie v. *Tompkins*, 304 U. S. 64.

C(1): Was There "High Water"?

It is submitted that no "high water" existed during the windstorm. It is not enough, as the Court below has done, to arbitrarily denominate the water "high water." The words "high water" as used in the exempting clause mean high tide in its commonly accepted sense, indicating only such "high water" as is reached by the *tide* in its normal and periodical flow and not water made "high" by wind.

In the first place, the plaintiff insists that sea-water driven up on the shore by wind does not answer to the definition of "high water" at all, and that the damage in our case cannot be construed as caused by "high water." Current definitions of this and allied terms are as follows:

> Funk & Wagnall's New Standard Dictionary: "High water—of or pertaining to *high tide*, or to its *time* or *altitude*."
>
> Century Dictionary: "High water—the greatest elevation of the water—the *flood tide*."
>
> Webster's Int. Dict.: "High water—the utmost flow or *greatest elevation of the tide;* also, the time of such elevation."
>
> 21 cyc. 436: "High water mark—intide waters, the line reached by the tide at its highest flow; the line reached by the periodical flow of the tide; the margin of the sea at high tide."
>
> Howard *v.* Ingersoll, 54 U. S. 381, 423, quoted in Words & Phrases, p. 3290: "High water mark, as used in reference to the sea or a river in which the tide ebbs and flows, should be construed to mean the line reached

by the periodical flow of the tide, and *not the line marked by the advance of waters caused by winds and storms, freshets or floods.*"

Words in a contract must be taken in their natural and ordinary meaning and, as we have seen, the natural, ordinary and universally accepted meaning of "high water" as applied to the ocean is "the greatest elevation of the tide," and the word does not include the advance of waters caused by wind and storms.

C(2): Defendant Did Not Establish Defense of Tidal Wave and High Water

To avoid liability, the insurer relies on the exception in its policy eliminating liability for damage from high water whether wind driven or not. Plaintiff did not have the burden of negating the exceptions.

It may at this point be noted that decisions involving insurance policies consistently and universally hold that the burden of proof is upon the insurance company, which relies upon excepted risks in the policy contract to defeat recovery, to affirmatively prove that the loss came within the exceptions. The sole burden of the insured is to establish *prima facie* a loss within the primary coverage of the policy. Plaintiff does not have to negative the exclusions in the policy.

Zenner v. *Goetz*, 324 Pa. 432, 435, 188 Atl. 124;
Kinney v. *Co.* 159 Ia. 490; 141 N. W. 706.

In the case at bar, the defendant based its case upon the defense that "wind-driven high water" (an excepted risk) caused the loss, and, under the decisions, it had the burden of proving that affirmative defense. In the *Zenner* case the Court held that when plaintiff proved a loss specifically insured against:

"He was not required in addition to show that none of the risks excepted in the policy, of which carrying passengers for hire was only one, were present when the accident occurred. When a defendant seeks to avail himself of a substantive defense reserved in a policy of insurance, when he relies upon a fact specifically mentioned in a policy as relieving him of a liability generally assumed in the policy, the defense becomes an affirmative one and the defendant at that point must shoulder the duty of coming forward with evidence of what he affirms. * * * If the burden was on the plaintiff in the present case to negative the risk excepted in the policy 'it would necessarily follow that, for same reason, he was required to establish the nonexistence of all of the other stringent provisions by which the policy might be avoided;' as this court said in Fisher *v.* Fidelity Mut. L. Assn., 188 Pa. 1, 13, 41 A-467. In that case the suit was upon a life insurance policy rendered void if the insured died by his own hand; we held that plaintiff made out a *prima facie* case by proof of death and title in the policy, and that the burden of proving suicide, in order to avoid liability, was upon the insurer."

In the case at bar, the express condition of liability was damage by windstorm. This burden is satisfied upon proof that the windstorm did proximately or immediately cause the damage, notwithstanding that some other cause or factor may have contributed to the loss. This is undoubtedly the proper rule of law in Pennsylvania.

Trexler v. *Allemania Ins. Co.*, 289 Pa. 13, 136 Atl. 856.

The defendant has failed to establish its defense—it has not proved that the water was at flood tide and that "high water" caused the loss. The lower Court was led into error by a promiscuous use of the term "high water." We submit that the words should be given their common meaning.

As heretofore pointed out, an examination of the discussion by the Court below in its opinion shows that the real contributing cause which the Court found was *water* driven by wind, and not "high" water.

It must be remembered that the policy sued upon was written by the insurance company, that it accepted premiums for a risk which it had ample opportunity to inspect, and that it was not compelled to issue the policy. The rule of the cases that ambiguities in a policy must be construed against the insurer and in favor of the insured, is based on the broad general public policy that contracts of insurance are not to be interpreted to render them frivolous or ineffective; that they should not be construed to make them instruments of trickery, of artifice or fraud, but that they should be construed to give the insured protection against the hazards against which he sought to insure himself. Is there then, in this case, any basis for giving to the excepted risk—"high water"—any meaning other than the dictionary and textbook definitions heretofore quoted? By according those words their real meaning, the Court is required to say that the defendant has wholly failed to meet its burden of showing that "high water" caused this loss.

The Policy of Insurance Was Not Rendered Void by Reason of the Executory Agreement of Sale

Admittedly, there was an executory agreement for the sale of the property, but plaintiff had retained both title and possession at the time the loss occurred.

In *Glessner* v. *Insurance Co.*, 331 Pa. 439, the Court said:

> "Mere executory contracts unaccompanied by any transfer of possession do not constitute such a change as would render the policy void. Hill *v.* Cumberland Valley Mutual Protection Co., 59 Pa. 474; Kronk *v.* Birmingham Insurance Co., 91 Pa. 300; Walter *v.* Sun

Fire Office, 165 Pa. 381, 30 A. 945; Dunsmore *v.* Franklin Fire Insurance Co., 299 Pa. 86, 149 A. 163."

Thus, under the Pennsylvania law, a contract for the sale of real estate does not, in itself, constitute a breach by the owner of the "sole and unconditional ownership" clause of his policy. It is necessary that there be both a transfer of possession and a transfer of title. Under the New Jersey authorities cited by the Circuit Court, it would appear that a contract of sale accompanied by a change of possession constitutes a breach of the clause even though title has not passed, but even under the rule of the New Jersey cases, a change of possession is essential in order to bar recovery.

There is also authority in Pennsylvania that a condition in a policy of fire insurance, that the policy shall be void "if the interest of the assured be other than the unconditional and sole ownership," relates to the ownership of the property *at the date of the issuance* of the policy and not at the date of the fire (or other casualty) which destroyed it.

Collins v. *London Assurance Co.*, 165 Pa. 298;
Walter v. *Sun Fire Office*, 165 Pa. 381.

It is respectfully submitted that the petition for certiorari be granted.

JOSEPH A. BALL,
Attorney for Petitioner.

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TABLE OF CASES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition in this matter should be denied both upon the merits and the questions of law involved. Since petitioner has seen fit to present the questions of law before the merits of this case, your respondent is following the same procedure for the Court's convenience.

1. THE POLICY WAS A NEW JERSEY CONTRACT.

Both the District Court and the Circuit Court of Appeals concluded that the policy in suit was a New Jersey contract. There was ample basis for this finding. As the Circuit Court has well pointed out, the policy contained the following provision:—

> . . . "but this policy shall not be valid until countersigned by a duly authorized Agent of the Company at 58-14 Collingswood, N. J."

As the Circuit Court stated in its opinion now reported in 155 Fed. 2nd 988, 990:—

> "Plaintiff based its right of recovery squarely upon the written insurance contract which it incorporated into its statement of claim. This was reiterated in plaintiff's opening to the Trial Court. The policy was put into evidence in the plaintiff's case. At no time was there the slightest suggestion of any waiver of the mandatory counter-signature provision above quoted. There was no claim by either party that the policy was void because not actually countersigned at Collingswood. . . . The provision calling for the countersignature must be construed to mean countersigned at Collingswood. This being so, plainly the policy was intended by the parties to be a New Jersey contract. The last thing to be done, without which there was no agreement, was the New Jersey counter-

signature. It is on that specific agreement that the suit is founded."

Perhaps more pertinent, petitioner has failed to cite one instance where the law of Pennsylvania is in anywise in conflict with the law of New Jersey on the issues here involved. We have found none. In fact, the cases of both States seem to be in complete accord.

2. THE POLICY WAS VOID.

The policy in suit contains the following provision:—

> "This entire policy shall be void, . . . if the interest of the insured be other than unconditional and sole ownership; . . . or if any change other than by the death of insured, take place in *the interest, title or possession* of the subject of insurance . . ." (emphasis supplied)

The uncontradicted facts establish that petitioner had entered into an agreement of sale approximately one month before the alleged loss. The Circuit Court said in its opinion (page 991):—

> "Appellee (respondent here) urges that under the above quoted language the policy was void on the date of the alleged loss. We think this is sound doctrine under the New Jersey decisions. In *Grunauer v. Westchester Insurance Company*, 72 N.J.L. 289 (Ct. E. & A.) a fire insurance policy was held void because prior to the fire the insured had executed a formal contract to sell the insured premises to a third party. That case was followed in *Levin v. State Assurance Co.*, 105 N.J.L. 422 (Ct. E. & A.) 144 A. 797."

The identical rule is followed in Pennsylvania and is specifically sustained in the case upon which petitioner relies namely, *Glessner v. Neshannock Mutual Fire Insurance Company*, 331 Pa. 439 (1 A. 2nd 233). In that case

the Supreme Court of Pennsylvania at page 444 cites, with approval, the case of *Levin v. State Assurance Company*, 105 N.J.L. 422 upon which the Circuit Court based its decision in this case.

It is true that in both the *Glessner* and *Levin* cases, possession had changed. However, this fact was not controlling. As stated by the Circuit Court in the case at Bar (page 991):—

> "As seen, the element of possession which was in the Levin decision was absent here. Possession, however, is merely one feature of ownership and even without it the Levin opinion must be held to establish the New Jersey rule against the Appellant (petitioner here)."

The same rule is expressed by the Pennsylvania Supreme Court in the *Glessner* case.

The condition of the policy in suit by its express terms includes any change—

> ". . . in the interest, title *or* possession." (emphasis supplied)

3. THERE WAS NO LOSS.

On February 2, 1942, approximately one month before the alleged loss, petitioner entered into an agreement to sell its Brigantine property, including the pier, which was the subject of this suit, for the sum of $70,000. On March 10, 1942, approximately one week after the alleged loss, petitioner completed settlement for the property and received the full sale price of $70,000. Petitioner and its purchaser had stricken out of their agreement of sale the provision (Paragraph Eighth thereof) to the effect that the insurance upon the property should be continued for the benefit of the purchaser. Clearly, therefore, the purchaser had no interest in the insurance and has no interest in the present law suit. Just as clearly, petitioner suffered

no loss whatever by reason of the alleged damage to its pier. The present law suit was an afterthought and is merely an attempt by petitioner to get something for nothing.

The Supreme Court of Pennsylvania in *Spratt v. Greenfield*, 279 Pa. 437 (124 A. 126) ruled directly on this question as follows (page 438) :—

> "The general rule is that the purchaser must bear any loss occasioned to the property incurring after the execution of the contract and before delivery of the deed because, unless provided to the contrary, the purchaser to all intents and purposes becomes the owner of the land; the vendor retaining title merely as trustee to secure the payment of the unpaid purchase money."

The policy in suit was a contract of indemnity and unless a loss is shown, there is no right of recovery. *Weightman v. Union Trust Company*, 208 Pa. 449 (57 A. 879).

4. PETITIONER FAILED TO PROVE DAMAGE BY WINDSTORM.

The Trial Court found specifically (Findings of Fact No. 10) that there was no evidence that the damage or any part of it was caused solely and directly by the wind. This was the basic issue upon which petitioner's right of recovery rested. The policy specifically provided that it insured the premises "against all direct loss or damage by windstorm." Plaintiff, therefore, had the burden of proving that the damage to the pier was caused by a windstorm. Plaintiff called only three witnesses whose testimony may be summarized as follows:

Samuel Deitch testified that he was the officer in charge of the United States Weather Bureau at Atlantic City, New Jersey, and that their office records indicated that a storm occurred on March 2 and 3, 1942. He characterized

it as "moderately severe." He had no personal recollection of the particular storm and he knew nothing concerning any damage to petitioner's pier. He stated that he did have a personal recollection of other storms about the same period which he recalled because of their unusual severity.

Harold J. Barker testified that he was a contractor who did bulkhead and pier work at Brigantine Beach. On or about March 10 or 11, 1942, *at the request of the new owner* he made an inspection of the pier for the purpose of estimating the cost of repairing it to make it safe for use. The principal repairs which he found necessary were new pilings. He stated that these were required because the existing pilings were old and were rotted and worm eaten and needed to be replaced. He stated that the front end of the pier (approximately 30 feet) had disappeared. In answer to a direct question, he gave as his opinion that the front end of the pier had been washed away by the action of the waves. This witness knew nothing of any damage caused to the pier by windstorm.

Harry Fried testified that he was the President of the plaintiff corporation and gave his opinion as to the value of the pier. This witness likewise knew nothing of any damage to the pier by windstorm.

This was the sum total of petitioner's evidence. It will be noted that it fails completely to establish that any damage was caused by a windstorm. The only damage mentioned was to the pilings and to the tip of the pier, both of which were exposed to the action of the sea. There is no evidence that even a shingle was blown off the building erected on the pier or that any other structure in the vicinity was in anywise damaged.

Assuming, as petitioner argues, that a *prima facie* case showing damage by windstorm was made out, nevertheless, as the District Court found specifically (Findings of Fact No. 9)

> "The loss and damage to the pier was caused by high water driven by wind."

a loss expressly excluded by the terms of the policy. The plaintiff's own evidence fully supports this finding.

5. CONCLUSION.

For the reasons above discussed, the petition should be denied.

Respectfully submitted,

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